



The future of labor studies, from a labor lawyer's point of view

François Gaudu

► To cite this version:

François Gaudu. The future of labor studies, from a labor lawyer's point of view. 2010. halshs-00466793

HAL Id: halshs-00466793

<https://shs.hal.science/halshs-00466793>

Preprint submitted on 29 Mar 2010

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

The future of labor studies, from a labor lawyer's point of view.

1. How might future labor studies evolve, from a French labor lawyer's point of view?

I would first point out several factors that may affect labor studies issues:

- Technological changes;
- The increasing opening of the goods and services market, which increases competition between legal systems;
- Demographic changes;
- The financial and economic crisis.

Thus, research questions rely on hypothesis:

First, I suppose that a new era has (possibly) begun in the early 2000s, where deregulation is not the main worldwide question anymore (I).

Second, globalization and internationalization will nevertheless continue to produce effects on labor and employment issues (II).

Third, no technological breakthrough with the 1990s seems occur, but changes in work will go on (III).

I. The change in trend of labor and social security law.

2. Since the first oil crisis (1974), Western developed nations have lived with the idea that social law must to a certain extent be deregulated. Maybe, Japan joined this group later (during the 90's crisis). But finally, it seemed, at the end of the 20th Century, that strong social law was, to a certain extent, obsolete (maybe to be compensated by the growth of fundamental rights). After thirty years of increasing protection for workers (since World War II to 1974), there was a long period of questioning the validity of protective labor law.

3. When it came back from the World labor law congress of Sydney (September 2009), the French delegation had a different perception of the situation. I just want to point out several elements:

On the European side, it is possible to speak of relative failure of deregulation, more than increasing employment stability. However, the first version of the "Green book" submitted to public debate by the European Commission ("Modernizing labour law...", COM(2006) 708 final, 22 Nov. 2006), that tried to imply less employment stability, has been reviewed. This reversal can be compared to the French Government's withdrawal in 2008 of its initial project to replace the two types of employment contract, fixed term contract and open-ended term contract, by a "sole labor contract", that would have led to deregulation of economic dismissals.

Regarding employment law, you may also consider that (1) Australia adopted in 2009 an act (Fair work Act) increasing workers' protection in case of unfair dismissal. (2) China has already adopted (promulgation June 2007 29) a new statute regarding employment

contracts. In the public debate opened by the Chinese Government, this new statute was criticized by American (and European) Chambers of Commerce of Shanghai as “the return of the iron rice bowl”. Even if it is very exaggerated, and even if the meaning of an Australian statute and of a Chinese statute are obviously different, this Chinese new statute certainly increases employment stability.

But we should also take into account that in 2003, Japan adopted a revision of the Labor Standards Act confirming that abusive dismissals are void. This statute follows the 2000 Labor Contract Succession Act, insuring employment stability in case of companies’ split or merger.

4. Considering now workers’ participation in corporate governance and collective bargaining, we should note the 2009 Australian Fair Work Act that partially rectifies previous deregulation in this country and modernizes the awards system. Of course, the American project of “Employees Free Choice Act”, that would reinforce unionization, if it adopted by the Senate, is an important element. In any case, the new American presidency leads to a more balanced National Labor Relations Board, and it is for American unions an improvement.

We may add that, following German lawyers, *Mitbestimmung*, which used to be very criticized few years ago by employers, is now better accepted by all the partners, because it reveals itself to be helpful in the face of the crisis. We may also consider that, despite the 2002 reform, a large majority of Japanese companies has kept the traditional (informal German-like) system, instead of choosing the American system of corporate governance.

Ten years ago, a World labor law Congress was an occasion to ask to foreign colleagues: -“How far does deregulation go in your country?” For the first time, we came back from Sydney with the idea: deregulation is not the main issue anymore. Maybe, a new era is beginning. After thirty years of workers protection (44-74), thirty years of deregulation vogue, a new period has started.

5. Questions resulting for research are: first, of course, is it true, or is it the wishful thinking of old Europe labor law supporters? If it is true, what will be the main trends of this new period (since nobody can believe it will be only a return back to the past days)?

6. Another question is: “-Why?” One thing is for sure: the world crisis doesn’t explain all the changes: laws enacted in China and Japan, like political shifts in the US, and in Australia as well, took place before the recent world crisis. I would say that social conflicts, national traditions, loss of influence of mainstream economy theory, after a long time of intellectual hegemony, might have played a role. But it needs of course a very cautious examination.

7. And another question is: “How?”

Some believes that the renewal of labor and social security law would depend on international norms. A globalized international labor and employment law (maybe based on international fundamental rights) would contain the excesses of free market.

As we can observe, this is not what is actually happening. All the evolutions previously quoted depend on national norms.

Thus, maybe the importance of national norms is greater than many people imagined. Converging national norms, instead of the imaginary worldwide system of norms? Or a combination of both? Comparing the future of national and international norms is a very challenging issue.

II. Continuing effects of globalization.

1) Continuing competition between legal systems.

8. If we assume that the hypothesis previously presented is correct, this doesn't make the competition between legal systems cease. In the EU, the Western countries, with their protective social regulations, must compete with the Eastern countries, where the workforce is much cheaper. Plant relocation in emerging countries is also an issue.

Then, it is possible to assert together:

(1) That the deregulation era is no longer the mainstream worldwide trend;

(2) That pressure leading to deregulation may still occur in the most protective countries, because they continue to sustain a harsh competition from less protective countries. New regulations in China, obviously, even if it is a step forward, doesn't fix the situation in Europe or in Japan.

Therefore, the level of pressure that will remain on the legal systems of developed countries is another very interesting research issue. It involves to a certain extent the issue of protectionism.

2) The future of union power based regulations versus the future of written labor law.

9. In the European debate, the two cases *Laval* and *Viking* (judged by the European Court of Justice December 18 and 11 2007) are very controversial. In these cases, the Swedish and Finnish unions lost against Baltic companies. The Swedish law of trade dispute, that allows industrial action close to secondary action, was overruled by the European principle of free market of services and freedom of establishment.

This example raises the question: do labor law systems based mainly on the power of trade unions have a chance of surviving? The power of unions decreased in the US and in Great Britain in the early 80s, following conflicts where Governments played an important role. More recently, several European court decisions censure union security clauses used in British Islands or Scandinavian countries (European Court of Human Rights, January 11 2006, regarding Denmark), and nowadays, collective action seems restricted in the EU when directed against certain forms of social dumping.

Maybe the form of enacted, written labor law (the "continental" type, civil law type, of regulation) is more resilient than the unwritten labor law that assumes strong unions, with freedom to impose union security clauses and possibility to use broad means of collective action. The fact that China has chosen this kind of written regulation is of course interesting.

3) Comparative economic data to be criticized.

10. Public debates on labor law are influenced by the existence, for example in the OECD, of comparative indicators. But these indicators may be questioned.

For instance, the so-called employment protection rate established by OECD may seem not to be a solid scientific data. *Inter alia*, it is fragile, because it overestimates the quantitative data – like delay to give notice, amount of severance pay, duration of procedures, etc.; and underestimates the qualitative data – power of unions, worker participation in corporate governance, *Mitbestimmung* in Germany... And this OECD data underestimates the existence of a network of collective agreements. With this kind of tool, you can always show that it is easier to dismiss in Sweden than in Mexico, which doesn't make a lot of sense.

Sometimes results are even absurd – for example, in 99, the OECD wrote that regulations of collective dismissals were stricter in the US than in France or in the Netherlands. That must be because of the WARN act, but anyway, a rate is useless if you have to correct it by intuition.

A new area of research has thus developed in France, with lawyers and sometimes sociologists, about evaluating labor regulations, and criticizing the way the economists establish and use data.

If the debate continues to be influenced by these kinds of tools, the criticism of these comparisons will be relevant.

III. Changes in work go on.

1) Work intensification, new health and safety issues, harassment...

11. I will take French examples.

France has very low working time duration, with very high intensity of work (productivity) per hour. It maybe presented like a collective choice: in the eighties, French companies more or less cease to employ the less efficient part of manpower (accepting on the other hand that the unemployment system indemnifies the unemployed without too much coercion). The door was then opened too increase productivity and work intensity. This is why the “35 hours” reform was relatively compatible with efficient work.

Thus, France, despite low working time duration, is very concerned by new diseases, stress related diseases, or repetitive strain injuries. The growth of pressure on workers resulting, *inter alia*, from new technologies and especially from new means of communication, concern all countries.

Certain high-tech French companies recently have had an epidemic of suicides, which reveals, possibly, a “management through stress” system.

How to regulate these new problems? The rise of moral harassment individual claims, since labor law uses this notion, may conceal a broader collective labor conditions issue.

A trend of the past year is to present the workers as “individual victims”, when they are in fact suffering from collective work organization. Between individual claims and lack of collective control, how can the modern working conditions be regulated?

Another health and safety issue may result from the acceleration of innovation processes. New techniques, new substances, quickly tested, sometimes only numerically tested, imply new risks.

2) New patterns for employees' careers.

12. In all the developed countries, stable employment relations, even if they concern a large majority of workers, have decreased and atypical work has increased. Furthermore, especially with the crisis, stable workers meet, more often than in the past, redundancies procedures or economic dismissals.

This means that, for a large portion of the workforce, a career is no longer a single stable contract.

This statement is not recent. In the 90s, several concepts are used to propose new solutions, with the purpose of allowing workers to organize the transitions between successive activities, instead of passively going through unemployment periods: "état professionnel des personnes" (Alain Supiot, 1999), transitional markets (Gunther Schmidt, 2005), "Sécurité sociale professionnelle" (professional Social Security) after French unions and politicians, flexicurity, after Dutch and Danish experiences...

What has practically been done to build a better organization of transitions? (Financial means, legal means, legal freedom to leave a job for another, consequences in the area of social protection...)? Is flexicurity a united concept, or (more likely) does flexicurity take different paths, certain more market oriented (British?), certain more integrative (Danish...)?

3) Fundamental rights and public policies.

12. Anyway, the growth of atypical work, and the increasing participation of women in the labor market, has raised the question of discrimination and equality at work. Other issues, like combination between personal life and professional life, arise.

On the one hand, these questions will presumably continue to gain importance. In the past decades, fundamental rights are often used to compensate the lack of support to old fashion regulations.

On the other hand, certain important and recent regulations (for example, business transfer regulations) don't have much to do with fundamental rights. Instead, they typify public policies.

How will the growth of fundamental rights combine with the renewal (if any) of public policies?

In the public debate, the argument of discrimination is sometimes used against public policies (for example, the situation of atypical workers is invoked to justify deregulation of stable contract workers, presented as "insiders"). If discrimination is a double-edged blade, to study the conflict that may occur between workers protection and the fight against discrimination is a very challenging topic.

4) Immigration and labor law.

14. Difficulties of poor countries, and the very different problems of rich countries (low birth rate), converge to make immigration a still important phenomenon.

Immigration leads to questions that presumably differ from one country to another. Nevertheless, some questions are common: is there a principle of equality, regarding labor law, between migrants and local workers? Do regulations apply to everybody? How do foreign workers get access to Social Security, employment insurance, etc.?

What is unions' policy regarding the risk of social dumping? Blocking immigration or promoting equality? Or a mix of the two: blocking newcomers, while asking for regularization of persons already (informally) working in the country. The position of the US "Change to Win" union, and the evolutions in the position of Japanese unions, may indicate that this question is evolving.

5) The financial and economic crisis.

15. Finally, it is very difficult to raise solid conclusions, because we are going through a worldwide crisis.

The last that important worldwide crisis, 1929 crisis, introduced a very significant change in the development of social law. Of course, this is strongly related to Roosevelt's New Deal. It would have been very difficult to announce, in 1930, that ten years later, a great alliance will adopt the goal of "securing, for all, improved labor standards, economic advancement and social security" (article 5, Atlantic Charter).

We are not certain that the present crisis has ended. The way it can redefine the trends and impose new agenda is not predictable – except, that maybe neo-classic economy will continue to lose credit, after having dominated for a while.

Finally, ten years ago, the way of Rhenish capitalism – with long term cooperation between management and workers' representatives – seemed to have lost, for the benefit financial capitalism – which has no need to speak with the workers. This hypothesis is weakened by the crisis.

François Gaudu

Professor, Sorbonne School of Law (Paris 1 University)

President of the French Society for Labor and Social Security Law